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November 18, 1997

Via Hand Delivery

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, DC 20554

Re: MCI Petition for Declaratory Ruling Regarding Software Sublicensing and Unbundled Access, CCBPol 94-4, CC Docket No. 96-98

***Ex Parte* Presentation**

Dear Mr. Caton:

Applied Digital Access, Inc. ("ADA"), by its attorneys, and pursuant to Sections 1.1200 *et seq.* of the Commission's rules, hereby submits in duplicate *ex parte* materials in opposition to the above-captioned request for declaratory ruling by MCI.

These attached materials reflect the entire substance of a meeting between counsel for ADA and members of the Common Carrier Bureau's Policy and Program Planning Division conducted on Monday, November 17, 1997. These materials also reflect the position of ADA in regard to this matter.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

D.D.S.

Delbert D. Smith

0+1

cc: Chairman William Kennard
Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael Powell
Commissioner Gloria Tristani
Richard Metzger, Chief, Common Carrier Bureau
Richard Welch, Chief, Policy and Program Planning Division
Don Stockdale, Deputy Chief, Policy and Program Planning Division
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November 18, 1997

Via Hand Delivery

Mr. Richard Welch
Chief, Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: MCI Petition for Declaratory Ruling Regarding Software Sublicensing and Unbundled Access, CCBPol 94-4, CC Docket No. 96-98

***Ex Parte* Presentation**

Dear Mr. Welch:

Applied Digital Access, Inc. ("ADA"), by its attorneys, and pursuant to Sections 1.1200 *et seq.* of the Commission's rules, hereby submits in duplicate, pursuant to its meeting with officials from your Division on November 17, 1997, *ex parte* materials reflecting ADA's opposition to the above-captioned request for declaratory ruling by MCI.

In its Petition, MCI asked the Commission to rule that new entrants into the local marketplace need not obtain separate licensing or right-to-use agreements prior to purchasing and using certain unbundled network elements not owned by the incumbent local exchange carrier ("ILEC") in possession of the elements. In essence, MCI asks the Commission to disregard the intellectual property rights of the owners of these network elements. As such an owner, ADA strongly opposes the grant of MCI's Petition because the resulting infringement of property rights would cause serious and irrecoverable harm to its business.

ADA is an independent telecommunications equipment manufacturer based in San Diego, California. ADA designs, tests, manufactures, and markets hardware and software

products that enable telephone companies to monitor and maintain their digital services. The company holds a number of patents for its innovative technology. One of ADA's principal products, the T3AS, is the industry's only permanently installed network element remotely accessing circuits at the DS3 or DS1 rates that provides a complete integrated suite of test and performance monitoring capabilities. The element is emplaced at the network boundaries, yet when used with sectionalization modules, it can test and manage other points in the network. This product is classified as an operational support system ("OSS") network element as it performs a "maintenance and repair" function.

ADA sells its hardware to carriers, but conveys only a license to all of the software elements of its products. While the terms of these software licenses vary slightly among ADA's customers, the licenses are generally perpetual, non-exclusive, non-transferable, and non-sublicensable. These licenses generally restrict use to that expressly authorized under the contract terms and prohibit use by any party that is not a parent, subsidiary, or affiliate of the licensee. As such, ADA retains title and a proprietary interest in its software.

ADA invests a majority of its research and development budget creating and improving its software. It produces significant revenues from initial release software licensed in conjunction with equipment sales and from software upgrade and maintenance programs. ADA's economic health and ability to compete in the telecommunications equipment marketplace rests in large measure on its ability to market and protect its software. In light of these circumstances, ADA opposes the MCI Petition and takes particular issue with three of its aspects.

1. *MCI states that Sections 251 and 253 of the Telecommunications Act of 1996 require that the Commission preempt any separate licensing requirement for access to unbundled network elements.*

The very language of Section 251(c)(3) of the Communications Act instructs that access to unbundled network elements is to be granted by ILECs on rates, terms and conditions that are "just, reasonable, and nondiscriminatory." *See also* 47 U.S.C. § 252(d). Through its careful use of such qualifying language, the Congress has made it clear that competitive local exchange carriers ("CLECs") cannot expect to gain access to unbundled network elements for free or on a subsidized basis, but by means of reasonable and fair compensation and other business terms. This Congressional directive would be rendered meaningless if the Commission were to rule that the property interests of equipment and software suppliers, whose products help make the networks of today operate efficiently and effectively, would not be included in the equation of what constitutes "just, reasonable and nondiscriminatory" terms and conditions.

Indeed, the Commission has already ruled that CLECs may not demand interconnection or access to unbundled network elements without bearing the reasonable costs involved in this regulatory entitlement. To the extent ILECs incur costs to provide such interconnection or access, they are entitled to recover such costs from requesting carriers. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, FCC 96-325, CC Docket No. 96-98 (rel. Aug. 8, 1996) ("*Local Competition Order*"), ¶¶ 199-200. Plainly, the cost to the ILECs of sublicensing or securing sublicenses for rights to proprietary software employed in such unbundled network elements must similarly be borne by MCI and other requesting carriers.

Also, MCI's request requires an overly-broad interpretation of the Commission's regulatory authority. Nowhere in the Communications Act is the Commission given authority to

override fundamental intellectual property law or contract law, especially rights vested in parties not squarely under the Commission's regulatory jurisdiction. Indeed, the Commission historically eschews efforts, such as MCI's present one, to entangle its regulatory authority with federal and state regulation of intellectual property rights. *See* 47 U.S.C. § 414 (1996); *Teleprompter Corp. v. Columbia Broadcast System, Inc.*, 415 U.S. 394, 406 n.11 (1974). Several commenters in this proceeding also have raised this jurisdictional argument.

Further, if the Commission were to rule in favor of MCI's Petition, the action would serve to permit an illegal taking of the intellectual property of ADA and similarly situated network element manufacturers. Permitting an unlicensed CLEC to use ADA's software would amount to the unauthorized granting of property rights and the deprivation of lawful royalties. Despite this proceeding, there has been inadequate notice, a lack of due process, and no consideration of reasonable compensation regarding this issue. Any assumption of property rights facilitated by Commission action will cause financial harm to ADA and will be an unlawful taking.

2. *MCI states that intellectual property rights are not typically implicated in the purchase of unbundled network elements.*

This is a wholly unsubstantiated assertion by the petitioner which is incorrect as applied to the normal business practices of ADA and other commenting parties in this proceeding. In addition to the sales and maintenance contracts associated with the hardware portion of ADA's products, ADA derives substantial revenues from software licensing agreements. These licensing agreements serve to formalize and control the copyrights vested in ADA and carefully licensed to ADA customers. ADA invests considerable time and money in the development of this software. The licensing agreements, integral to all hardware sales contracts, protect the property from loss through theft or intentional damage. In short, ADA's

intellectual property interests that are licensed to ILECs and other carriers are vital to the company's existence.

Granting the MCI Petition would create a situation in which innumerable software licensing agreements would be breached. Such a result would be inimical from a policy perspective in that it would represent a gross disincentive to the innovative spirit which is driving today's information-based marketplace. *See, e.g., Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems,* 11 FCC Rcd. 2429, 2433 (1996) ("We recognize the importance of protecting the integrity of intellectual property . . . for the creation of communications networks.").

It would also result in a firestorm of infringement suits by ADA and similarly situated software owners. While conducting such litigation would be costly, ADA would have no choice but to turn to the courts for the enforcement of its rights. Similar actions by other equipment manufacturers would clog the courts unnecessarily and, because of the litigation costs in dollars and damaged business relationships, dampen telecommunications equipment marketing-efforts nationwide.

3. *MCI argues in the alternative that if intellectual property rights are found to be implicated, then the primary licensee, usually an ILEC in ADA's case, should bear the administrative burden of sublicensing the property.*

The disingenuity of MCI's earlier arguments is revealed by its advancement of this alternative position. Intellectual property rights <u>are</u> at the core of this debate, but MCI and other new local market entrants -- primarily large interexchange carriers -- want the ILEC to bear the costs of their entry. ADA does not take sides on this issue because ADA sees all telecommunications carriers as potential customers for its proprietary software. ADA's only

concern is that all users, ILEC, CLEC, IXC, etc., pay for use of ADA's property in accordance with any and all agreements entered into for that purpose. Any other use is an infringement of its property rights.

ADA submits that there are two acceptable methods for effective sublicensing. The first and favored method would permit ADA directly to license each user. This method allows ADA and other intellectual property owners to retain appropriate control over their property. ADA would favor a method similar to that imposed by the Public Utilities Commission of Texas Arbitration Award, PUC Docket No. 16189 *et seq.* (Nov. 7, 1996), whereby an ILEC would facilitate the obtaining on behalf of a new entrant of any license subject to certain timelines so that effective market entry would not be delayed.

A second method would be to permit the primary licensee/ILEC to sublicense rights to the property without the direct involvement of the property's owner. ADA would cooperate in such an approach by granting its affected customers sublicensing authority on reasonable terms. This solution would necessitate the negotiation and drafting of addendum clauses for insertion into all of ADA's existing licensing agreements, for which a reasonable transition period would have to be granted.

Conclusion.

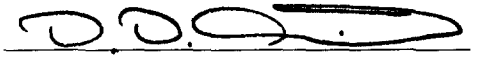
ADA respectfully requests that the Commission deny MCI's Petition. To rule otherwise would cause great harm to ADA and similarly situated equipment vendors. ADA's competitive viability, and ultimately its survival, depends upon a telecommunications marketplace with many carriers--the same marketplace that was envisioned by the authors of the 1996 Telecommunications Act. New entrants/carriers to this market should not be obstructed,

and the Act and the *Local Competition Order*, are drafted to ensure this is so. To this end, the property rights and business viability of equipment manufacturers, on whose products the market is built, cannot be taken away.

Respectfully submitted,

APPLIED DIGITAL ACCESS, INC.

By Its Attorneys.



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